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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OHIO HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE OHIO HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

The Ohio Historical Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae.* Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Ohio Historical Society was founded in 1885 by Ohioans interested in preserving their heritage and is now one of the largest state historical societies in the country. The Society is a repository of more than two

million historical artifacts from Ohio, and is dedicated to interpreting, collecting, and preserving the state's heritage. Bordered by Lake Erie on the north and the Ohio River on the south, Ohio has a rich maritime history, and the Ohio Historical Society is charged with preserving that history.

The Ohio Historical Society believes that the outcome of this case will determine ownership rights of many long-lost artifacts, such as shipwrecks, for years to come. Long-lost shipwrecks provide us with a wealth of historical information. For instance, a great deal can be learned about trade practices from merchant ships; about warfare from warships; and about specialized professions, such as fishing, from ships designed for specific functions. There is also a wealth of technical information embodied in the remains of ships, such as evidence of design and construction that is often revealed by toolmarks on the timbers and other markings. Moreover, much of the "economy, society, and culture" of seafaring communities is reflected in the contents of ships. Keith Muckelroy, *Maritime Archaeology* 101 (1978).

If, as the Fourth Circuit held in this case, the law of salvage is to be preferred in cases of long-lost shipwrecks, we will lose forever a window into the past and the opportunity to study and share our rich cultural heritage. A long-lost shipwreck is far more than just a collection of rotted wood, rusted metal, and artifacts on the ocean floor; each shipwreck is a unique repository of our history and cultural heritage. The Ohio Historical Society is deeply concerned about the devastating impact the decision below will have on the preservation of historical material and information.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, nonuse, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE OHIO HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Founded in 1885 by Ohioans interested in preserving their heritage, The Ohio Historical Society is now one of the largest state historical societies in the country. The Ohio Historical Society is a repository of more than two million historical artifacts from Ohio, and is dedicated to interpreting, collecting, and preserving the state's heritage. In addition, The Ohio Historical Society offers a broad range of activities designed to educate the public

about the history and archaeology of Ohio and the valuable lessons that we all can learn from the past. Bordered by Lake Erie on the north and the Ohio River on the south, Ohio has a rich maritime history, and The Ohio Historical Society is charged with preserving that history.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUE OF WHAT CONSTITUTES ABANDONMENT IS OF PARAMOUNT IMPORTANCE TO THE FUTURE OF HISTORIC PRESERVATION IN THIS COUNTRY

The issue of when long-lost shipwrecks are effectively abondoned is one of first impression before this Court. Although the question of what rights accrue to a finder or salvor upon locating a shipwreck can be traced back to Rhodian and Roman maritime law, *see* M. Norris, *The Law of Salvage* 1, 4-7 (1958 & Supp. 1974), the development of the law in this area has lagged behind the development and refinement of marine technology in the post-World War II era. We are thus at a crossroads requiring this Court's attention to this case.

Upon a finding of abandonment, the maritime law of finds protects the totality of interests in historic shipwrecks. This is true largely because the law of finds requires those who recover long-lost items to preserve their findings in a manner so as to maximize the historical and scientific value of the recovery. *Columbus-America Discovery Group, Inc. v. Unidentified and Abandoned Sailing Vessel*, 1989 AMC 1955, 1958 (E.D. Va. 1989). Conversely, the law of salvage imposes no such duty. In fact, the law of salvage encourages salvors and other claimants to carve shipwrecks into sections, thereby destroying all of the irreplaceable information that can be gleaned from the wrecks as a whole. *See* Nancy Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement*, 16 Tul. Mar. L.J. 1 (1992).

Thus, whether the law of salvage or the law of finds will apply to long-lost shipwrecks is especially important in the context of historical preservation. If, as the Fourth Circuit held in this case, the law of salvage is to be preferred in cases of long-lost shipwrecks, we will lose forever a window into the past and the opportunity to study and share our rich cultural heritage. The outcome of this case will determine ownership rights of many long-lost artifacts for years to come.

II. MUCH OF OUR CULTURAL HERITAGE MAY BE UNCOVERED ONLY THROUGH MARITIME CONSERVATION AND PRESERVATION EFFORTS

An abundant amount of the material evidence of our past now lies underwater. In fact, the remains of dwellings and even primitive boats, as well as rudimentary implements and utensils, have often been preserved in remarkable condition in the mud or silt of rivers and lakes. Additionally, vestiges of harbors and even whole cities that have succumbed to sea level changes or catastrophes now lie beneath the seas. Because boats and ships, one of the first means of viable, efficient transportation, have carried passengers and cargoes across estuarine and coastal waters and the open seas for thousands of years, the remains of many voyages have likewise been preserved within the seabed. *See generally* Colin Martin, *Archaeology in an Underwater Environment, in Protection of the Underwater Heritage* 14 (1981) [hereinafter Martin, *Archaeology*].

A. Long-Lost And Abandoned Shipwrecks Provide A Rare Opportunity To Peer Through A Window Of Time

Long-lost shipwrecks provide us with a wealth of historical information. For instance, a great deal can be learned about trade practices from merchant ships; about warfare from warships; and about specialized professions, such as fishing, from ships designed for specific functions.

This information in turn is evidence of the achievements and aspirations of those who constructed the ships and the societies in which they lived.

It is only with the occurrence of a "shipwreck that the whole unit—ship, cargo, and shipboard community—is deposited on the seafloor, creating a material record that is archaeologically recoverable. . . ." *Id.* at 75. That material record is primary evidence of our cultural heritage.

1. *Shipwrecks Are Storehouses Of Valuable Historical Information About Shipboard Life And Seafaring Societies*

The crew of a ship, particularly a sea-going one, is a self-contained society, in many respects representing a microcosm of the community left ashore. Much of the "economy, society, and culture" of seafaring communities is reflected in the contents of ships. Keith Muckelroy, *Maritime Archaeology* 101 (1978) [hereinafter Muckelroy, *Maritime Archaeology*]. Such contents help reconstruct life in the past by providing what is in a literal sense a "time capsule of the varied objects in general use at a given period." *See* Martin, *Archaeology* at 21.

Thus, shipwrecks are "storehouses of materials and information on the shipboard life of time." Kenneth Cassavoy, *The HAMILTON and The SCOURGE: A First Look, in Nautical Archaeology* 176, 187 (Susan M. B. Langley & Richard W. Unger eds., 1984) [hereinafter Cassavoy, *Nautical Archaeology*]. Moreover, "the fact that all the objects which sink with a ship were in use up to the moment of disaster (though some, of course, may have been older than others when they were lost) gives such a collection yet further archaeological value." Martin, *Archaeology*, at 21. The wealth of historical information that properly excavated and preserved shipwrecks can contain is tremendous:

> As cultural resources [shipwrecks] provide valuable information about the historic changes in vessels and

> also about changes in warfare and commerce. About their place in history, moreover, we learn not only from their cargoes, but also from their utensils and other artifacts of daily life they carried and that sank with them: plates, glassware, cutlery and clothing, for example. As such they can be understood as potential museums of temporal context, preserving a collection of items and also a narrative segment of history which their routes, logs, and wreckage present to the archaeologist as a unique challenge to preserve. In some cases, they may provide extremely rare evidence. . . .

Anne Giesecke, *Shipwrecks: The Past in the Present*, 15 Coastal Mgmt. 179, 180-81 (1987).

The fact that shipwrecks can take us on a journey back through time is perhaps best illustrated by the *S.S. Central America*, which has given us a rare glimpse into daily life in pre-Civil War America. The *S.S. Central America* settled almost two miles down onto a plain with extremely low temperatures and very little turbulence. Because of these favorable conditions, the *S.S. Central America* has been preserved in remarkable condition and thus offers unique insight into the past.

Columbus-America Discovery Group has already retrieved numerous links to our past from both the ship and her cabins and stores. The vast array of artifacts that has been recovered include the ship's bronze bell marked "Morgan Iron Works—New York—1853," whiskey bottles, a porcelain wash basin and the lid from a container of "Roussel's Unrivaled Premium Shaving Cream." Charles Herdendorf, *Discovery in an Alien Environment*, American History Illustrated, Mar.-Apr. 1991, at 66, 71. Some of these artifacts were found in passengers' trunks, which also revealed clothing ranging from men's shirts and trousers to undergarments and bodices. The clothing has been "a very significant vehicle for understanding the daily lives of people. It represents the choices and decisions made by people, and as such

it is a key to the behaviors of the past." Tim Noonan, *History Under the Sea*, American History Illustrated, July-Aug. 1992, at 59, 62.

Aside from the *S.S. Central America*, the wreck of the *Trinidad Valencera* is a prime example of the sort of historical information that even a single ship can yield. The *Trinidad* was part of the Spanish Armada, and its cargo was part of a siege train to be used by the invading army once it had landed in England. The *Trinidad's* cargo included the dismantled parts of gun-carriages such as wheels, axles and limbers, numerous small supply items including scaling poles, water flasks and a keg of gun powder. But, the most spectacular find of all was five bronze cannons. The cargo recovered from the *Trinidad* "has highlighted an aspect of the Armada which is often overlooked, its role as a supply squadron." Muckelroy, *Maritime Archaeology*, at 101.

The contents of the *Trinidad* also revealed information about life during the sixteenth-century:

> The *Trinidad Valencera* site also illustrated the significance of these wrecks as a cross-section of late sixteenth-century society. Her Venetian origins were betrayed not only by the Venetian cannon found on board . . . but also by sherds of characteristic brightly painted Venetian earthenware. More surprisingly, a few pieces of Chinese porcelain were also found, reflecting the amenities enjoyed by the superior officers. The range of ordinary Spanish wares from this site was also of interest, since some items, notably the olive jars and plates from Seville, were apparently derived from the ship's first mustering at Cadiz, while other pottery types represented stores taken on at the final assembly point at Lisbon.

Id.

There is also a wealth of technical information embodied in the remains of ships, such as evidence of design and construction that is often revealed by toolmarks

on the timbers and other markings. Information about the ancillary fittings of ships can also be gleaned from the remains of their propulsion, rigging and steering arrangements, anchors and equipment connected with the maintenance and running of the vessels. Piecing this information together helps us understand ships in their original form, as complex and highly organized technical machines.

B. Long-Lost Shipwrecks Afford Us The Opportunity To Check Historical Accounts Against History Itself

Long-lost shipwrecks also give us "the rare opportunity to check historical accounts against history itself." Cassavoy, *Nautical Archaeology*, at 187. In some instances, historical accounts accepted for decades or even centuries are belied by information gathered from shipwrecks. For example, in one historical account of the sinking of the *Scourge*, as narrated by passenger Ned Myers to James Fenimore Cooper, Myers noted that "[t]he starboard second gun, from forward, had capsized and come down directly over the forward hatch, and I caught a glimpse of a man struggling to get past [it] . . . ." *Id.* at 187 (quoting James F. Cooper, *Ned Myers, or a Life Before The Mast* (1843)). The photographic evidence of the wreck of the *Scourge*, however, tells a somewhat different story. From the photographs, it can clearly be seen that none of the guns capsized back on the deck. All of the cannons were, in fact, still in their respective ports. Although the account recorded by Cooper was often regarded as the definitive source of information both on the details of the ship itself, and as a fully factual account of the sinking of the *Scourge*, it is no longer viewed as dispositive.

The very existence of certain artifacts in long-lost shipwrecks also assists us in better understanding events that happened before the dawn of recorded history. For instance, the archaeological evidence of pottery found aboard a small Greek trading vessel indicated that, con-

trary to widely accepted notions, Phoenicians from Syria played an important part in the sea trade of the time. This was an extremely important discovery because,

> one of the reasons for giving a late date to the writing of Homer's *Odyssey* has been the frequent mention in it of the activity of Phoenician merchants. Now that we know this Phoenician trading was going on by the twelfth century BC, we may have to revise our ideas about when Homer lived and wrote. A few scraps from the sea-bed can influence literary history as well.

Paul Johnstone, *The Archaeology of Ships* 25-26 (1974).

III. THERE ARE OVERWHELMING POLICY REASONS MILITATING IN FAVOR OF APPLYING THE LAW OF FINDS TO LONG-LOST SHIPWRECKS AND OTHER ARTIFACTS

There are overwhelming policy reasons for applying the maritime law of finds to long-lost shipwrecks. Application of the law of finds achieves certainty and predictability in legal rights. As time passes, memories fade, claims become stale, witnesses are lost and the chances of mistake, or even fraud, become great. The corresponding need for repose increases. Proof of ownership and property rights in a free society cannot be based on sheer speculation or unknown contingencies. Expending resources in litigation over title, when such resources could be better spent on historic preservation and scientific study, is wasteful and will burden our court system for years to come.

A. The Fourth Circuit's Opinion Encourages Finders Of Shipwrecks To Conceal Their Discoveries

The law should encourage investigation and preservation of information about historic shipwrecks. Thus, those who find shipwrecks should have every incentive to act openly, and to strive to determine as much as possible about the shipwrecks. Yet, somewhat ironically, the

Fourth Circuit's opinion provides precisely the opposite incentive. By according a presumption of enduring vitality to ownership interests, the decision below actually discourages finders from investigating conditions, items and structures at the wreck site that may link a particular recovered artifact with a specific crew member, cargo owner, or passenger. In effect, the finder has a disincentive to develop historical information that might shed valuable light on our past.

CONCLUSION

A long-lost shipwreck is far more than just a collection of rotted wood, rusted metal and artifacts on the ocean floor; each shipwreck is a unique repository of our history and cultural heritage. Thus, the true treasure of the *S.S. Central America* is not only its gold, but also the bounty of historical, archaeological, and cultural data that may be collected using sophisticated conservation techniques. The Fourth Circuit's decision, granting a virtually irrebuttable presumption that the law of salvage applies to long-lost property, threatens our ability to gather and preserve the historical information revealed by shipwrecks. If the Fourth Circuit's opinion is allowed to stand, we will be deprived of further links to our past.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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